Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1693

TERRY TUCK, INC.,

Petitioner,

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Respondent.

REPLY BRIEF OF TERRY TUCK, INC.

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PETITIONER'S REPLY BRIEF.

Respondent states that, in support of our statement that the Ninth Circuit has decided a federal question which conflicts with applicable decisions of this Court "petitioner immediately misstates the holdings in the three cases upon which it relies: *Great Northern R. Co. v. O'Connor*, 232 U.S. 508 (1914); *Atchison, T. & S.F. Ry. Co. v. Robinson*, 233 U.S. 173 (1914); and *George N. Pierce Co. v. Wells Fargo & Co.*, 236 U.S. 278 (1915)."

Nothing could be further from the fact. Our petition very accurately stated that the *O'Connor* case was "Like *Carl* . . . a case in which the shipper had shipped goods at a rate which provided for a lower valuation than the goods' actual value and when the goods were lost, sought to recover their actual value." (Pet. Br. pg. 6.)

Actually, it is respondent which has completely misconceived the thrust of those three cases in which this Court

took pains to point out a clear distinction as to conclusiveness of the filed rates where *fraud of the carrier* was involved.

It is obvious that the filed rate is conclusive where neither shipper nor carrier has committed a fraud.

It is obvious that the filed rate is conclusive where the shipper has committed (or attempted to commit) a fraud upon the carrier.

It should be equally obvious that if, as respondent suggests, this Court had been concerned in those three cases *with the shipper's fraud* or attempted fraud, there obviously would have been no need to point to the circumstances where the filed rate was *not* conclusive. Thus, unless this Court's statements were aimed directly *at the carriers* there would have been no purpose whatever in the Court specifically stating that the filed rates were *not* conclusive when there was "something to show rebating or false billing"[1] or "an attempt at rebating or false billing"[2] and finally, that the conclusiveness of the filed rates had "no application to fraudulent acts or false billings."[3]

It is significant that while the first two of those cases spoke of "rebating or false billing", the third, *Pierce*, went even further and spoke more broadly of "*fraudulent acts*", as to which the doctrine of conclusiveness of the filed rates had no application.

It was to the carriers that the Court was issuing the warning that when they engaged in "fraudulent acts", they could not cloak themselves in the immunity (conclusive presumption) of their filed rates.

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[1]*Great Northern R. Co. v. O'Connor, supra.*
[2]*Atchison, T. & S.F. Ry. Co. v. Robinson, supra.*
[3]*George N. Pierce Co. v. Wells Fargo & Co., supra.*

Petitioner's second point that "From a Practical Standpoint, the Relief Sought by the Petitioner Would Inevitably Lead to Massive Rebating and Discriminatory Practices" not only has nothing to support it, either in the record or in any fact of common knowledge of which this Court could take cognizance but, as we pointed out in our Petition,[4] was squarely disposed of by this Court in *Chicago & N.W. Rwy. v. Lindell*, 281 U.S. 14 (1930), a case which respondent, understandably, ignores completely—as it also similarly ignores *Southern Pacific Company v. Miller Abbattoir Company*, 454 F.2d 357 (3rd Cir. 1972).

We add only one short note—the statement in Respondent's Brief, at page 6, from *R.E. Tharp Inc. v. Miller Company*, 261 Cal.App.2d 81, 67 Cal.Rptr. 854 (1968) (a case, incidentally, which was decided on a matter of pleading rather than substance) that "it is common knowledge that carriers are less than enthusiastic in their pursuit of litigation to recover undercharges from their customers" is belied by respondent's own actions.

Respondent's enthusiasm for pursuit of such litigation was so great that its corporate counsel was able to write in a letter to petitioner's attorneys, "Evidently you feel that our Mr. Armstrong misled Terry Tuck about the freight rates. As you undoubtedly are aware, *whatever misrepresentations* Mr. Armstrong may have made do not affect your client's liability for freight charges . . . . Therefore, the *relevant question is not whether Mr. Armstrong is telling the truth* but whether we charged Terry Tuck the proper tariff.[5] " [Our emphasis.]

Respondent has sued for and collected the charges embodied in its "proper tariff".

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[4]Petition, pgs. 13-14
[5]R. 180-181

The only question here is whether petitioner is to be denied an opportunity to prove its damages resulting from respondent's Mr. Armstrong's fraudulent misrepresentations and to recover them when proven after it has been determined, among other things, by a Court, not by counsel, whether or not Mr. Armstrong's truth-telling or lack of it is relevant and by a jury, not by counsel, whether in fact Mr. Armstrong is, or was, telling the truth.

May 27, 1980.

Respectfully submitted,

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